No. 86-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ANGOON, *et al.*,
Petitioners

v.

DONALD HODEL, *et al.*,
Respondents

On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT SHEE ATIKA, INC.

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BRIEF IN OPPOSITION OF RESPONDENT SHEE ATIKA, INC.

Respondent Shee Atika, Inc.[1] herewith submits its brief in opposition to the petition for a writ of certiorari filed herein by the Sierra Club, the City of Angoon, *et al.* ("Sierra Club-Angoon"). The petition seeks review of *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986) ("*Angoon II*"). (The court of appeals also issued an earlier opinion herein *sub nom. City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984) ("*Angoon I*").)

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[1] Shee Atika, Inc. is an Alaska Native corporation formed pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.*, to represent the interests of the Natives of Sitka, Alaska.

STATEMENT OF THE CASE

For the most part, the statement of facts contained in the opinion of the court of appeals in *Angoon II*, supplemented by the statement of facts in *Angoon I*, adequately (and more accurately) states the facts. An additional factual statement is required, however, regarding the so-called Rule 56 claim because that issue was first raised by Sierra Club-Angoon on rehearing.[2]

This litigation, initiated in 1982, involved a multi-count legal challenge by Sierra Club-Angoon to Shee Atika's economic enjoyment of lands conveyed to it pursuant to the Alaska Native Claims Settlement Act ("ANCSA") and the Alaska National Interest Lands Conversation Act ("ANILCA").

In the course of this litigation, upon demand of Sierra Club-Angoon, the Corps of Engineers prepared an environmental impact statement for a log transfer facility proposed to be constructed by Shee Atika on its Admiralty Island lands. The EIS process, commenced in April 1983, culminated with the issuance of a Final Environmental Impact Statement ("FEIS") on November 9, 1984. The FEIS recommended, as the "environmentally preferred alternative",[3] construction of the proposed facility. The FEIS also found that construction/operation of the facility would not significantly adversely affect Native subsistence, and that there would be no adverse impact on public access to Cube Cove, where the facility would be located.[4]

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[2] A copy of the Sierra Club-Angoon petition for rehearing is reprinted in the Appendix as App. A.

[3] NEPA regulations require federal agencies to specify an "environmentally preferred alternative" during the EIS process. *See* 40 C.F.R. §§ 1502.14(e), 1505.2(b) (1986).

[4] Court of Appeals Excerpts of Record ("E.R."), at 159, 264. The FEIS was preceded by a Draft Environmental Impact Statement, released April 6, 1984, which likewise recommended con-

In April 1984, Sierra Club-Angoon obtained a preliminary injunction enjoining Shee Atika from timber harvesting on its Admirality Island lands on the ground that such harvesting was barred by section 503(d) of ANILCA. On appeal, the court of appeals reversed in *Angoon I*, and remanded the case to the district court on December 27, 1984.

On remand, the district court, on March 4, 1985, consolidated the four cases comprising the Shee Atika litigation and ordered Sierra Club-Angoon to file an amended consolidated complaint. The amended complaint was filed on April 3, 1985.[5] Therein, Sierra Club-Angoon conclusorily alleged that the federal permits issued to Shee Atika and the timber operations proposed by Shee Atika were violative of NEPA. The complaint made passing reference to the FEIS, alleging that it was improperly prepared for failure to study the alternative of an exchange of the Cube Cove lands "and otherwise without complying to the fullest extent possible with NEPA. . . ." E.R. 14. The parties filed motions and cross-motions for summary judgment or dismissal covering every issue raised by the consolidated complaint.[6]

In its dispositive motion, Shee Atika sought dismissal of the NEPA counts, *inter alia*, on the ground that undefined, conclusory allegations of NEPA violations were legally insufficient under *Vermont Yankee*.[7] On May 21,

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struction of the facility, and made similar findings concerning subsistence and public access.

[5] While Sierra Club-Angoon purported to file a "draft complaint", this ploy was rejected by the district court as being without authority.

[6] In all, some 113 entries (including 35 briefs) were recorded in the district court docket from the time the case was remanded to the district court (January 1985) to issuance of the district court's NEPA Order (November 27, 1985). E.R. 378-83.

[7] *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978).

1985, responding to Shee Atika's dispositive motion, Sierra Club-Angoon devoted one sentence (out of a 33-page brief) to their "undeveloped NEPA claims", as follows:

> Plaintiffs allege that the EIS is inadequate for other reasons as well, but until they have the opportunity for further factual development, including discovery, and further legal analysis, plaintiffs are not prepared to present their case on these points.[8]

On that same date, Sierra Club-Angoon filed a motion for partial summary judgment on the FEIS, seeking invalidation for failure to study the "exchange alternative". No mention was made therein of any reserved NEPA issues.

Finally, in a June 18 filing, Sierra Club-Angoon perfunctorily opposed dismissal of their "undeveloped NEPA claims", citing to an attached affidavit of counsel. That affidavit alleged (i) that Sierra Club-Angoon were not then able to "present by affidavit facts essential to justify their opposition", (ii) that they had not yet commenced any discovery on their "undeveloped NEPA claims", (iii) that, believing that success on their "exchange alternative" issue would make other NEPA discovery unnecessary, they had opted to defer such discovery. App. A at 27a.

Sierra Club-Angoon did not seek a Rule 56(f) continuance for discovery on the "undeveloped NEPA claims", nor did they formally move that judicial action be withheld on these claims.[9] No Rule 56(f) order was entered by the district court.

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[8] On June 10, Shee Atika specifically opposed the Sierra Club-Angoon attempt to reserve "undefined, unarticulated NEPA arguments until some indeterminate time in the future."

[9] During the year-plus period from release of the FEIS (November 1984) to issuance of the district court's NEPA decision (November 1985), Sierra Club-Angoon never sought any discovery on

On November 27, 1985, the district court issued its decision on the NEPA issue. The court stated the issue as follows:

> The NEPA aspect of plaintiffs' second and third claims may therefore be distilled to the following pair of allegations: that the Section 404 Permit for the log transfer facility (LTF) was issued without compliance with NEPA, and that as a result the log transfer portion of Shee Atika's timber operation may not proceed. The parties have cross-moved for summary judgment on these allegations. [App. D. to the Sierra Club-Angoon Petition at D-7.]

Further, the court described Sierra Club-Angoon's NEPA argument as follows:

> Plaintiffs contend that the EIS is inadequate because it fails to consider, pursuant to NEPA § 102(2)(c)(iii), the possibility that as an alternative to building the log transfer facility Shee Atika could exchange its lands for other federal timberlands not on Admiralty Island. [*Id.* at D-8.]

The court made no mention of any "undeveloped NEPA claims", or that these claims were reserved for further litigation.[10]

In their several briefs to the court of appeals, Sierra Club-Angoon never contended that there remained to be litigated "undeveloped NEPA claims." The existence of these claims was first noted in Sierra Club-Angoon's petition for rehearing. The court of appeals denied that petition, without requesting Shee Atika or other parties to respond thereto.

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the "undeveloped NEPA claims." During this same period, Sierra Club-Angoon sought, and obtained, discovery on other litigation issues.

[10] The district court expressly retained jurisdiction over other claims.

I. THE DECISION OF THE COURT OF APPEALS DOES NO VIOLENCE TO THE FEDERAL GOVERNMENT'S NAVIGATIONAL SERVITUDE, AND DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

Fundamentally misconceiving the essence of the federal navigational servitude, Sierra Club-Angoon posit a decision entrenching upon federal constitutional powers and otherwise at odds with controlling precedent. This case presents no such pernicious elements.

The decision of the court of appeals is fully in accord with this Court's pronouncements on the federal navigational servitude. The navigational servitude—which has its origin in the Commerce Clause—is an attribute of federal sovereignty, and not a real property concept. *See, e.g., United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956) ("That Clause speaks in terms of power, not of property.").

The governmental nature—the sovereignty aspect, if you will—of the navigational servitude power has been stressed by the Court. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375-76 (1977); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950).[11] The Court has also emphasized that proprietary concepts are

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[11] Even where there has been disagreement as to the applicability of the navigational servitude, there has been unanimity as to its sovereign—as opposed to proprietary—nature. For example, in *United States v. California*, 332 U.S. 19 (1947), Mr. Justice Frankfurter, in dissent, distinguished between ownership rights and exercise of the Commerce Power: "[R]ights of ownership are something else." *Id.* at 44. Similarly, in *Kaiser Aetna v. United States, supra*, Mr. Justice Blackmun, dissenting, noted that what is at issue with respect to the navigational servitude "is a matter of power, not of property." *Id.* at 187.

inapplicable with respect to navigable waters. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913).[12]

Specifically, the decision below does not conflict with this Court's recent decision in *Amoco Prod. Co. v. Village of Gambell*, 107 S. Ct.. 1396 (1987) and *United States v. Cherokee Nation*, 107 S. Ct. 1487 (1987). *Gambell*, to the extent that it is relevant to the instant case, dealt with the interest of the United States in OCS lands, and not the attribute of sovereignty known as the navigational servitude. In fact, the navigational servitude power was not even mentioned in the *Gambell* opinion. OCS lands are clearly more susceptible to proprietary concepts, given that the United States has asserted such ownership interests therein as to command the payment of lease royalties for drilling rights. Such rights are different *in kind* from the exercise of regulatory power embodied in the navigational servitude. Thus, nothing in the decision below conflicts with *Gambell*.

Similarly, the decision below is not at odds, either directly or inferentially, with *Cherokee Nation*. In *Cherokee Nation*, the Court identified the navigational servitude as "an exercise of the Government's power to regulate navigational uses". 107 S. Ct. at 1490. The Court also spoke of the navigational servitude as a matter of "sovereign authority," *id.* at 1492, and stated that a waiver of same would not be lightly implied. *Ibid.* The decision below involved no waiver, no relinquishment, no diminution of the navigational servitude. The federal permit approvals reviewed in the litigation represented an exercise of that governmental power, not frustration of it.

Finally, the decision below is not in conflict with the Submerged Lands Act. That Act distinguishes between "ownership" interests and the governmental power em-

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[12] This case was most recently cited with approval in *United States v. Cherokee Nation*, 107 S. Ct. 1487, 1492 (1987).

bodied in the navigational servitude. *Compare* 43 U.S.C. §§ 1311, 1313 *with* 43 U.S.C. § 1314; *see also United States v. Rands*, 389 U.S. 121, 127 (1967). In the Submerged Lands Act, the United States quitclaimed its proprietary interests in the beds of navigable waterways,[13] while restating the "sovereign authority" of the United States over navigability, as expressed in the navigational servitude concept. There is nothing in the decision below contrary to these policies and concepts.[14]

II. CERTIORARI REVIEW OF THE STATUTORY INTERPRETATION OF SECTION 503(d) OF ANILCA IS NOT WARRANTED AS A MATTER OF POLICY OR ON THE MERITS

On two occasions, the court of appeals has held that section 503(d) of ANILCA cannot legitimately be interpreted to prohibit timber harvesting on Shee Atika's Admiralty Island lands because such a construction would be contrary to congressional intent, and would nullify another provision of ANILCA. *See Angoon I*, 749 F.2d at 1416-18; *Angoon II*, 803 F.2d at 1022-25.

Further review of this issue is not warranted. Section 503(d) of ANILCA applies only to the Admiralty Island National Monument and the Misty Fjord National Monu-

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[13] *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 324 (1973).

[14] There is also no merit to the contention of Sierra Club-Angoon that a regulatory void regarding subsistence will exist absent a finding that section 810 of ANILCA is applicable to federal permitting activities. The FEIS prepared by the Corps specifically addressed the subsistence issue, and, in that regard, it was found that construction/operation of the facility would not significantly adversely affect subsistence. E.R. 159. (The FEIS also found no adverse impact on public access (navigability). E.R. 264.) In *Amoco Prod. Co. v. Village of Gambell*, 107 S. Ct. 1396, 1400 n.5 (1987), the Court listed no less than six environmental statutes which were applicable to OCS activities. These same statutes are applicable to the waters in Cube Cove and other waters within the three-mile limit.

ment. There are no inholdings within these Monuments similar to Shee Atika's, and the question of the interpretation of section 503(d) will not recur. Under such circumstances, Supreme Court review is unwarranted as a matter of policy. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951).

Further, the decision below is not in conflict with either *Gambell* or *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981). *Gambell* involved interpretation of a separate statutory phrase, involving a different statutory framework and a different legislative history. Indeed, the Court noted that the "plain meaning" rule must give way when there is evidence "that Congress actually intended another meaning." 107 S. Ct. at 1406. In the instant case, there was overwhelming legislative history to the effect that Congress intended that Shee Atika develop its lands. *See Angoon I*, 749 F.2d at 1416-18; *Angoon II*, 803 F.2d at 1022-25. The statutory interpretation adopted by the court of appeals was thus consonant with *Gambell* and not contrary to it. In like fashion, the decision below does not conflict with *Minnesota v. Block*. In that case, the court noted that its "plain language" interpretation was consistent with "the purpose and legislative history of the act." 660 F.2d at 1248 n.15. The interpretive route chosen by the court of appeals here was ascertainment of the will and intent of Congress, a methodology fully consistent with the pronouncements of this Court.

Finally, on the merits, the decision of the court of appeals was both legally correct and equitable. The court of appeals concluded that to deny Shee Atika harvesting rights on its Admiralty Island lands would be to deprive it of the most valuable usufruct of those lands, and that such an anomalous, indeed bizarre, result could not have been intended by Congress. The court further held that the interpretation urged by Sierra Club-Angoon would effectively nullify section 506(c) of ANILCA which di-

rected the conveyance of Admiralty Island lands *in settlement* of Shee Atika's ANSCA entitlement, again a result that could not have been intended by Congress.

Review of the Sierra Club-Angoon's interpretation of section 503(d) of ANILCA is clearly unwarranted.

III. THE RULE 56 ISSUE POSITED IN THE PETITION DOES NOT WARRANT REVIEW

Review of the propriety of entry of summary judgment on the adequacy of the FEIS is not warranted for the following reasons: (A) the decision below is not in conflict with the precedents of this Court, nor is it so extraordinary as to call for exercise of this Court's supervisory powers; (B) the record facts do not support the Rule 56 claim alleged by Sierra Club-Angoon; (C) the action of the court below was fully in accord with the spirit and letter of the Federal Rules and the adjudicative law.

A. Review Is Not Called For Under Certiorari Policy

Nothing in the opinion of the court of appeals can be said to be in conflict with the precedents of this Court. Similarly, the opinion below will not perplex, nor will it intimidate, future litigants with respect to Rule 56 procedures.

The opinion of the court of appeals does not discuss Rule 56 standards, does not announce any new interpretation thereof, and it can hardly be considered a radical departure from orthodoxy. In fact, the Rule 56(f) question and the "undeveloped NEPA claims" were a non-issue until Sierra Club-Angoon raised same in their petition for rehearing.

B. Sierra Club-Angoon Never Properly Presented, Prosecuted Or Preserved A Viable Rule 56(f) Issue

The record facts fail to support the assertion of a viable Rule 56(f) issue. Instead, that record shows that

Sierra Club-Angoon's allegation of "undeveloped NEPA claims" was never properly raised and/or that it was abandoned.

Sierra Club-Angoon's sole record basis for their "undeveloped NEPA claims" is an affidavit of counsel attached to a legal brief filed with the district court (and not otherwise brought to the attention of that court), and two isolated references to these "undeveloped" claims in the several hundreds of pages of legal and factual arguments submitted by Sierra Club-Angoon to the district court.[15]

Sierra Club-Angoon never filed a motion, nor otherwise requested the district court to defer decision on *all* NEPA issues, nor did they seek a continuance so that they could pursue Rule 56(f) discovery on their "undeveloped NEPA claims". There being no extant request for Rule 56(f) relief, the district court entered no order.

The record also shows that Sierra Club-Angoon never pursued any discovery with respect to their "undeveloped NEPA claims". There was ample opportunity for discovery from issuance of the FEIS (November 1984) to the decision of the district court on the NEPA counts (November 1985). Further, the decision to forego discovery was a tactical one, with Sierra Club-Angoon being content to rely on their "exchange alternative" argument with respect to the adequacy of the FEIS. Certiorari review does not lie to correct tactical misjudgments or litigating errors.

In its decision, the district court made clear *its* understanding that *all* of the NEPA issues had been submitted to it for determination. Likewise, the absence of mention

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[15] These two references consist of a one-sentence statement in a May 21, 1985 filing to the effect that Sierra Club-Angoon wished to challenge the FEIS on other grounds, but were not prepared to do so and a footnote reference in a June 18, 1985 filing objecting to dismissal of Sierra Club-Angoon's NEPA claims. *See* App. A at 21a, 24a n.1.

of Sierra Club-Angoon's "undeveloped NEPA claims" in their several court of appeals briefs confirms that no such issue was then extant.[16]

Thus, the record fails to support Sierra Club-Angoon's allegations of arbitrary, *sua sponte*, and unprincipled action by the court of appeals. To the contrary, the court of appeals, in directing summary judgment with respect to the adequacy of the FEIS, acted on the record developed before the district court, a record devoid of any unresolved or unlitigated NEPA issues.

There is no basis for Sierra Club-Angoon's plaints of procedural unfairness. They had ample opportunity to seek discovery and otherwise develop *all* of their NEPA claims. Sierra Club-Angoon consciously chose not to avail themselves of the discovery procedures afforded by the Federal Rules, and otherwise failed to properly utilize Rule 56 procedures; they cannot now claim a lack of opportunity to litigate.

In raising their "undeveloped NEPA claims" issue in their petition for rehearing with the court of appeals, Sierra Club-Angoon attempted to resuscitate an issue which was never properly raised or preserved before the district court, or was abandoned prior to judgment. Under these circumstances, the court of appeals was plainly correct in denying the petition for rehearing. The Federal Rules do not permit of *in pectore* pleading or practice.

C. Sierra Club-Angoon Were Not Entitled To Rule 56(f) Relief

Sierra Club-Angoon never formally sought Rule 56(f) relief before the district court. Such relief is not available for the first time on appeal.[17]

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[16] On the other hand, Shee Atika's briefs consistently represented that the only NEPA issue involved the "exchange alternative." See App. at 13a.

[17] *See* 10A C. Wright, A. Miller, M. Kane, *Federal Practice And Procedure* § 2740, at 535 (1983).

The case law developed by the lower federal courts on Rule 56(f) leaves no doubt that Sierra Club-Angoon's claims of procedural deficiencies are without legal support. First, the mere filing of a Rule 56(f) motion does not automatically stay the proceedings on the underlying motion for summary judgment.[18] A party seeking Rule 56(f) relief must diligently present and prosecute a Rule 56(f) application, since such relief is committed to the discretion of the trial court.[19] Second, the lower federal courts have accorded short shrift to litigants who fail to adequately apprise the court of their requests for Rule 56(f) relief.[20] Finally, a party who has been dilatory in discovery may not obtain Rule 56(f) relief.[21]

The Rule 56(f) claim raised on rehearing by Sierra Club-Angoon suffered from each of the deficiencies noted above. Their claim for Rule 56(f) relief was inadequately presented, and was not preserved; they took no direct action in the district court seeking a Rule 56(f) continuance or discovery; they made *no* attempt to obtain discovery on their "undeveloped NEPA claims". Thus, the court of appeals was fully warranted in denying their petition for rehearing on the ground that a Rule 56(f) issue had either never been properly raised, or had not been properly preserved, or had been abandoned. There was ample record support for each and all of the foregoing findings.

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[18] *See Gieringer v. Silverman*, 731 F.2d 1272, 1280 (7th Cir. 1984).

[19] *See United States v. Little Al*, 712 F.2d 133, 135 (5th Cir. 1983).

[20] *See, e.g., Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 926 (2d Cir. 1985); *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017 (5th Cir. 1983).

[21] *See, e.g., United States v. Bob Stofer Oldsmobile-Cadillac, Inc.*, 766 F.2d 1147, 1153 (7th Cir. 1985); *Walters v. City of Ocean Springs*, 626 F.2d 1317, 1322 (5th Cir. 1980); *Over The Road Driver's, Inc. v. Transport Ins. Co.*, 637 F.2d 816, 820-21 (1st Cir. 1980).

One final point needs to be made with respect to the spurious Rule 56(f) claim. As noted in both *Angoon I* and *Angoon II*, Sierra Club-Angoon have been successful in delaying Shee Atika's economic development of its ANSCA lands for several years.[22] For their own reasons, Sierra Club-Angoon are unalterably opposed to the policy decision made by Congress, and they have contested Shee Atika's rights in every conceivable forum and on every conceivable legal ground. Sierra Club-Angoon's new Rule 56(f) argument is but the latest stratagem in a campaign of opposition now into its twelfth year. Sierra Club-Angoon have had full opportunity to develop and present all their legal arguments, and their due process rights have been fully recognized and protected. The litigation trail and travails should end here.

CONCLUSION

For the foregoing reasons, the petition of Sierra Club-Angoon should be denied.

Respectfully submitted,

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June 12, 1987

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[22] *See* 749 F.2d at 1414-15; 803 F.2d at 1018-19.

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-4413, 86-3582, 86-3617, 86-3618,
DC# CV-83-234
Alaska (Anchorage)

CITY OF ANGOON, THE SIERRA CLUB, *et al.*,
Plaintiffs-Appellees,
v.
DONALD HODEL, Secretary of Interior, *et al.*,
Defendants,
and
SHEE ATIKA, INC.,
Defendant-Appellant,
and
SEALASKA CORP.,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Alaska

[Filed Nov. 22, 1986]

SIERRA CLUB/ANGOON'S PETITION
FOR REHEARING

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INTRODUCTION

Appellees Sierra Club, The Wilderness Society, and the City of Angoon ("Sierra Club/Angoon") respectfully petition for a rehearing of the appeal in the above-entitled cause, pursuant to Rule 40, Federal Rules of Appellate Procedure.

Sierra Club/Angoon believe the Court has overlooked material points of law in rendering its decision. While reserving their argued position as to each of the points of appeal, appellees address themselves in this petition solely to the issue of the propriety of the panel's entry of summary judgment in favor of Shee Atika-Sealaska on the adequacy of the Environmental Impact Statement ("EIS") and the validity of the § 404 permit for the log transfer facility ("LTF"). Specifically, appellees believe the Court erred in concluding that there were no genuine issues of material fact remaining in *sua sponte* directing summary judgment for Shee Atika-Sealaska.

SUMMARY OF FACTS

The instant controversy involves three consolidated appeals, resulting in turn from the earlier consolidation of four separate proceedings before the district court. On April 7, 1982, the Army Corps of Engineers ("Corps") issued a Department of the Army permit to Shee Atika, Inc. under § 404 of the Clean Water Act and § 10 of the Rivers and Harbors Act, authorizing the corporation to build an LTF at Cube Cove "for development of its privately-owned lands on western Admiralty Island." ER at 145.[1] On January 13, 1983 the City of Angoon and

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[1] In this petition, citations to the defendants' Excerpts of Records are in the following form: ER ——. The Sierra Club and the City of Angoon have filed joint additional Excerpts of Record in two volumes. Volume I contains excerpts from *Angoon v. Marsh*, No. A84-126 Civ. (now part of the instant consolidated action). Excerpts from Volume I are cited in the following form: *Marsh* CR

287 individual Natives filed their complaint in *Angoon v. Marsh*, alleging, *inter alia*, that approval of a § 404 permit for Shee Atika's LTF at Cube Cove without the preparation of an EIS was in violation of the federal defendants' duties pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* *Marsh* CR 1. On February 28, 1983, Sierra Club and The Wilderness Society intervened as plaintiffs, *Marsh* CR 13, and on March 21, 1983, Angoon and intervenors submitted a motion for preliminary injunction against federal approval of construction of the LTF. *Marsh* CR 20. On March 30, 1983, the federal government stipulated to suspend its earlier approval of the LTF, and to prepare an EIS. *Marsh* CR 28.

On March 22, 1984, Sierra Club/Angoon moved to enjoin construction of the permanent and timber harvesting on 40 acres of the inholding. *Marsh* CR 109. That work had begun even though federal approval was still suspended and the EIS was not yet completed. On March 28, 1984, the court granted a temporary restraining order halting construction of the LTF, but did not enjoin timber harvesting. *Marsh* CR 116. On March 28, 1984, the Corps issued a "Cease and Desist" order directing Shee Atika to halt its illegal fill activities. *Marsh* CR 114.

After expedited briefing and argument in April 1984, the court granted a preliminary injunction against timber harvesting, based on the statutory prohibition in § 503(d) of ANILCA ("[w]ithin the Monument[], the Secretary shall not permit the . . . harvesting of timber"). *Marsh* CR 168.

On December 27, 1984, the Ninth Circuit reversed the preliminary injunction. *Angoon v. Marsh*, 749 F.2d 1413

——, Tab. Volume II contains excerpts from *Angoon v. Hodel*, No. A83-234 Civ., which are cited as follows: *Hodel* CR ——, Tab ——.

(9th Cir. 1984). The case was remanded to the district court, where *Angoon v. Marsh* was consolidated with *Shee Atika v. Sierra Club I*, No. A83-209, *Shee Atika v. Sierra Club II*, No. A83-234, and *Sierra Club v. Watt*, No. A84-001. The case was renamed *Angoon v. Hodel*, No. A83-234 Civil. *Hodel* CR 58. At that time Shee Atika had pending a motion for summary judgment. This motion did not address the validity of the Corps' § 404 permit or the adequacy of the EIS.

The Corps' EIS was completed in October, 1984. ER 00136. However, the Corps did not issue its Record of Decision on the § 404 permit until February 25, 1985. ER 00325. Soon thereafter, the district court issued an order requiring Sierra Club/Angoon to file a consolidated complaint. This complaint incorporated a new claim that the § 404 permit which was issued, or about to be issued, pursuant to the Corps' February 25, 1985 decision was in violation of Sections 101 and 102 of the NEPA. The court further ordered that additional briefing on the existing summary judgment motions be filed within 30 days. (*See* Minute Order, March 4, 1985, *Hodel* CR 58, Exhibit A, attached; ER 00001, 15-16, 19.)

Upon the filing of the consolidated complaint in *Angoon v. Hodel* on April 29, 1985, ER 0001, Shee Atika and the federal defendants moved anew for summary judgment on all claims. ER 00111, 00113. On May 21, 1985, Sierra Club/Angoon filed a cross-motion for Partial Summary Judgment re: inadequacy of EIS for Failing to Study Exchange. ER 00116.[2]

As the foregoing facts demonstrate, the time period between the Corps' final decision and the submission of defendants' consolidated motions for summary judgment on all claims was extremely limited. Moreover, during this time the parties were required to prepare various

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[2] This cross-motion was subsequently resubmitted by stipulation on June 18, 1985. *Hodel* CR 140.

briefs on subsistence and other issues, pursuant to court order. *Hodel* CR 58, CR 83. For this reason, Sierra Club/Angoon cross-moved for *partial* summary judgment on the limited question of the adequacy of the EIS vis-a-vis its failure to study the alternative of a land exchange, while reserving for future consideration other violations of NEPA set forth in plaintiffs' consolidated complaint.

Because of the complicated nature of the case, the number of issues involved, the limited amount of time for discovery following the Corps' issuance of its decision, the possibility that success on plaintiffs' cross-motion for summary judgment would make a lengthy and burdensome consideration by the court of other NEPA issues unnecessary, Sierra Club/Angoon responded to Shee Atika and the federal defendants' motions for summary judgment by stating that complete resolution of all of plaintiffs' claims under NEPA was inappropriate at that time. Sierra Club/Angoon made clear that the adequacy of the EIS in light of the failure to study exchange was only one of plaintiffs' NEPA allegations, and that additional time was needed for discovery so that plaintiffs could fully present their case on these points. (Sierra Club/Angoon's Reply to Motion to Dismiss by Shee Atika and Federal Defendants, May 21, 1985, Hodel CR 119. Attached as Exhibit B.) Counsel for Sierra Club/Angoon also submitted an affidavit pursuant to Rule 56(f), Fed.R.Civ.P., requesting additional time to conduct discovery and thus opposing consideration of all EIS-related claims at that time. In support, this affidavit cited the numerous affidavits and admissions already on file which demonstrated the existence of controverted material issues of fact. (Plaintiffs' Reply In Support of Cross-Motion Summary Judgment on EIS Inadequacy Issue. Affidavit of Lewis F. Gordon, June 18, 1985, *Hodel* CR 143. Attached as Exhibit C.) Because the district court granted plaintiffs' cross-motion for par-

tial summary judgment, counsel's 56(f) affidavit and the other claims to which it related were never ruled upon below. *See* ER 00045, 00053-65; *Hodel* CR 146.

ARGUMENT

In reviewing the grant or denial of summary judgment, the appellate court is faced with the same task and governed by the same standard as that before the district court. *Jewel Companies v. Pay Less Drug Stores Northwest*, 741 F.2d 1555, 1559 (9th Cir. 1984). The court must determine, "on the basis of the pleadings, affidavits, depositions and other evidence available at the time the motion was made," whether there are any genuine issues of material fact and whether either party is entitled to prevail as a matter of law. *Jewel*, 741 F.2d at 1559; Fed.R.Civ.P. 56(c). The appellate court's review is to be *de novo* (*State of Alaska v. United States*, 754 F.2d 851, 853 (9th Cir. 1985), *cert. denied*, 016 S.Ct. 333 (1985); *Callahan v. Woods*, 736 F.2d 1269, 1272 (9th Cir. 1984)), and all evidence, facts, and inferences that can be drawn from the depositions, admissions, and affidavits on file must be viewed in the light most favorable to the party opposing summary judgment (*Aronsen v. Crown Zellerbach*, 662 F.2d 584, 591 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200 (1983); *Spectrum Financial Companies v. Marconsult, Inc.*, 608 F.2d 377, 380 (9th Cir. 1979), *cert. denied*, 466 U.S. 936 (1980)).

As Judge Sneed has previously noted, the granting of summary judgment is appropriate only where there is *no* genuine issue as to any material fact. *Hutchinson v. United States*, 677 F.2d 1322, 1325 (9th Cir. 1982). In making this determination, the court has a duty to consider the record as a whole (*John v. State of Louisiana*, 757 F.2d 698, 711-712 (5th Cir. 1985)) including documentary evidence previously submitted to the court (*Friends of the Earth v. Facet Enterprises, Inc.*, 618 F.Supp. 532, 535 (D.N.Y. 1984)). The appellate

court, like the trial court, is precluded from resolving factual disputes on motion for summary judgment (*New York Life Insurance Co. v. Baum*, 707 F.2d 870, 871-72 (5th Cir. 1983)), and cannot "weigh the evidence, pass upon credibility, or speculate as to the ultimate findings of fact" (*Aronsen*, 662 F.2d at 591). Rather the court must resolve all doubts in favor of the party opposing summary judgment (*F.S. Smithers & Co., Inc. v. Federal Insurance Company*, 631 F.2d 1364, 1366 (9th Cir. 1980)), including doubts about the existence of a genuine issue of material fact (*Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976) (citing Moore's *Federal Practice* ¶ 56.15(3) (1974) and citations therein)). *See also Lemelson v. TWR, Inc.*, 760 F.2d 1254, 1260-61 (Fed. Cir. 1985).

Under these well-established principles, the granting of summary judgment for Shee Atika-Sealaska on the adequacy of the EIS and the validity of the § 404 permit for the Cube Cove LTS was improper. In light of the procedural posture of the case, as discussed above, it becomes clear that upon reversing the district court's grant of summary judgment for Sierra Club/Angoon, the appellate court erred in failing to remand the case for further proceedings necessary to resolve the issues remaining.

Under 28 U.S.C. § 2106, appellate courts are granted broad powers to dispose of a case upon appeal. *MGPC, Inc. v. Dept. of Energy*, 763 F.2d 422, 433-34 (TECA 1985), *cert. denied*, 106 S.Ct. 76 (1985). Despite the fact that a party may have moved for summary judgment in the court below, § 2106's broad grant of authority allows an appellate court to direct the entry of summary judgment in favor of a non-moving party when justice requires. *Id.*; *Martinez v. United States*, 669 F.2d 568, 570 (9th Cir. 1982); *MGPC*, 763 F.2d at 434. The exercise of this power, however, is appropriate "only in the rare case" (*E. C. Ernst, Inc. v. General Motors*

Corp., 537 F.2d 105, 109 (5th Cir. 1976)), "since such a determination is best left to the trial court. . . ." (*MGPC*, 763 F.2d at 434). Entry of summary judgment by an appellate court is therefore appropriate only "when it would be just under the circumstances" (*id.*), such as when "it is very clear that all material facts are before the reviewing court" (*Ernst*, 537 F.2d at 109), and no purpose would be served by remanding the issue to the district court (*Shaw v. FBI*, 749 F.2d 58, 63 (D.C.Cir. 1984)). This is not such a case.

As Judge Sneed has cautioned, "[w]e are mindful too that summary judgment procedures should be used with care and restraint." *Hutchinson*, 677 F.2d at 1325. This caution is apt, because "the court must keep in mind that the entry of summary judgment terminates the litigation, or an aspect thereof" (*Jones v. Howe Military School*, 604 F.Supp. 122, 124 (D.Ind. 1984)), and "an improvident grant may deny a party a chance to prove a worthy case" (*Lemelson*, 760 F.2d at 1260 (quoting *D.L. Auld Co. v. Chroma Graphics Corp.*, 714 F.2d 1144, 1146 (Fed.Cir. 1983))).

Thus, entry of summary judgment by the appellate court should occur only when it is absolutely clear that there are no genuine issues of fact and the parties have had a full and fair opportunity to raise disputed issues of fact, counter the evidence submitted by an adversary, and present their case. *MGPC*, 763 F.2d at 434; *Callahan*, 736 F.2d at 1275; *Martinez*, 669 F.2d at 570; *Ithaca College v. N.L.R.B.*, 623 F.2d 224, 229 (2nd Cir. 1980) (quoting 6 Moore's *Federal Practice* ¶ 56.12 at 334 (1976)), *cert. denied*, 449 U.S. 975 (1980); *Ernst*, 537 F.2d at 109. Where there are issues most properly left to the trial court, the appropriate course is to reverse the entry of summary judgment and remand the matter to the district court for further proceedings. *Jewel Companies*, 741 F.2d at 1567; *Callahan*, 736 F.2d at 1269; *Suskind v. North American Life & Casualty Co.*, 607

F.2d 76, 84 (3rd Cir. 1979). *See, e.g., Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1608, 1075 (1st Cir. 1980) (district court is in better position to examine sufficiency of EIS with aid, if necessary, of further briefs).

These principles are no less applicable where the parties have filed cross-motions for summary judgment. *See Smithers*, 631 F.2d at 1366 (in case involving cross-motions for summary judgment, Ninth Circuit states that moving party must demonstrate absence of issues of material fact and entitlement to judgment as matter of law, with evidence and inferences viewed favorably to opposing party and all doubts resolved in opposing party's favor); *Callahan*, 736 F.2d at 1275 (in case involving cross-motions for summary judgment, Ninth Circuit declines to grant summary judgment for appellate because appellee would be unfairly deprived of opportunity to present pertinent evidence). Although for purposes of his or her own motion for summary judgment a party may submit an affidavit stating that there are no disputed issues of fact and that summary judgment should be granted, this admission applies only to the legal theory on which the party has submitted such motion, but does not constitute a waiver of the party's right to raise disputed issues of fact with regard to an adversary's contentions:

> "A party moving for summary judgment . . . may make certain concessions in favor of his adversary for the purposes of the motion that do not carry over and support summary judgment for the adversary."

Ernst, 537 F.2d at 109 (quoting Moore, 6 *Federal Practice* ¶ 56.12 at 56-337 (1976). *See also John*, 757 F.2d at 705; 10A Wright, Miller and Kane, *Federal Practice and Procedure*, Civil, § 2720 at 20-22 (1983).

Thus, the court, whether at the trial or appellate level, must review each party's motion independently and deter-

mine whether that party has met the strict burden of demonstrating that there are no disputed issues of material fact and that judgment is appropriate on those claims as a matter of law. *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978); *Lee v. Dayton Power and Light Co.*, 604 F.Supp. 987, 993 (D. Ohio 1985); *District 12, United Mine Workers of America v. Peabody Coal Co.*, 602 F.Supp. 240, 242 (D.Ill. 1985). The court must take care to ensure that in considering cross-motions for summary judgment, one or the other of the parties is not deprived of its opportunity to be heard on other issues. *Levine v. Fairleigh Dickinson University*, 646 F.2d 825 (3rd Cir. 1981). In reversing a lower court's grant of summary judgment, the appellate court must therefore decline to enter summary judgment for the opposing party if a genuine issue of fact exists (*John*, 757 F.2d at 705; *Fred A. Arnold*, 573 F.2d at 606), and should instead remand the case for resolution of those issues which the district court did not pass upon in its initial determination (*Hettleman v. Bergland*, 642 F.2d 63, 68 (4th Cir. 1981); *Grazing Fields*, 626 F.2d at 1074-75; *Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729, 734-35 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979)).

The principles outlined above are particularly applicable here. In moving for partial summary judgment, plaintiffs Sierra Club/Angoon specifically limited their motion to consideration of whether the Corps was required to study a land exchange as a reasonable alternative to the LTF and related harvesting. If, as eventually happened, that motion was granted, a complicated trial on other NEPA issues, requiring the testimony of expert witnesses, could be avoided, and both the court and the parties could be saved considerable, and avoidable, delay and expense.

As stated both in their response to defendants' consolidated motions for summary judgment (*see* Exhibit B)

and in the affidavit submitted pursuant to Rule 56(f) (*see* Exhibit C), plaintiffs believed that substantial factual disputes relating to their other NEPA claims existed, but because of the limited time for discovery, they were unable to fully document these facts in opposition to defendants' motions. Plaintiffs also noted that genuine issues of material fact were raised by the affidavits previously submitted with regard to earlier stages of the proceeding. As noted above, the court must make a determination of whether a genuine issue of fact exists of the basis of the record as a whole (*John*, 757 F.2d at 711-12), and documentary evidence already in the record is to be considered (*Friends of the Earth*, 618 F.Supp. at 535). Plaintiffs' declarations, together with the surrounding circumstances, compel the conclusion that genuine issues of fact existed concerning the validity under NEPA of Shee Atika's § 404 permit for reasons other than the EIS' failure to study the exchange alternative, and the awarding of summary judgment in favor of Shee-Atika-Sealaska was therefore inappropriate.

As previously discussed, summary judgment procedures must be used cautiously, so as not to deprive a party of a fair opportunity to be heard. *Hutchinson*, 677 F.2d at 1325. *See Fountain v. Filson*, 336 U.S. 681 (1949) (*sua sponte* entry of summary judgment by court of appeals was error, because it deprived party against whom judgment was entered opportunity to dispute facts material to that claim). For this reason, the Federal Rules allow for situations, such as that presented here, where additional time is needed in order to allow the opposing party a fair opportunity to present its case. *Alghanim v. Boeing Company*, 477 F.2d 143, 148 (9th Cir. 1973); *Argus Inc. v. Eastman Kodak Co.*, 552 F. Supp. 589, 600 (D.N.Y. 1982).

> "The purpose of the rule is to prevent premature grants of summary judgment in cases where, given

> adequate time to obtain discoverable material from the moving party, the party opposing the motion might be able to establish genuine issues of fact which would preclude summary judgment." (*McVan v. Bolco Athletic Co.*, 600 F.Supp. 375, 378 (D.Pa. 1984).)

As with other affidavits submitted in opposition to a motion for summary judgment, an affidavit submitted pursuant to Rule 56(f) "should be treated liberally" (*Patty Precision v. Brown & Sharpe Manufacturing Co.*, 742 F.2d 1260, 1264 (10th Cir. 1984)), and appropriate relief (either a continuance or denial of the summary judgment motion) should be granted "almost as a matter of course" (*McVan*, 600 F.Supp. at 378 (quoting *Ward v. United States*, 471 F.2d 667, 670 (3rd Cir. 1973)); *Costlow v. United States*, 552 F.2d 560, 563-64 (3rd Cir. 1977)).

> "Further, as an additional precaution against denying a party its chance to prove a worthy case, any doubt as to the presence or absence of disputed issues of material fact must be resolved in favor of the presence of disputed issues, or in other words in favor of the party opposing summary judgment." (*Lemelson*, 760 F.2d at 1261 (citations omitted); *Hector v. Weins*, 533 F.2d 429, 432 (9th Cir. 1976); *Doff v. Brunswick Corp.*, 372 F.2d 801, 804 (9th Cir. 1967), *cert. denied*, 389 U.S. 820.)

Without an opportunity to gather relevant information through discovery, or at the very least to submit affidavits presenting such disputed facts as can be established by the information already on hand, Sierra Club/Angoon will have been deprived of their opportunity to be heard. It is important to note that plaintiffs were given no notice of the fact that the appellate court intended to issue a final ruling on *all* NEPA claims. *See Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984) (court must

afford party against whom *sua sponte* summary judgment is to be entered notice and opportunity to respond). Pertinent facts and legal arguments pertaining to other defects in the Corps' EIS and resulting § 404 permit were neither presented in the parties' briefs nor argued before the panel. Both Sealaska and the Federal Defendants stated in their opening briefs that the question presented was whether the EIS was required to give detailed consideration to the alternative of exchange and the parties' NEPA appeals were clearly based only on that part of the district court's Nov. 27, 1985 ruling prohibiting issuance of a permit for construction of the LTF until the exchange alternative was explored. While Shee Atika's statement of the issues is somewhat convoluted, Shee Atika's briefs deal only with the exchange alternative issue. The Court's misunderstanding about the existence of disputed facts is perhaps understandable, however, because of the misleading statements put forth by Shee Atika. For instance, in its Opening Brief at 13 Shee Atika states (erroneously) that "[t]he only contention advanced by Sierra Club was that the Corps had violated NEPA by not conducting an in-depth study of exchange. Sierra Club did not challenge in any manner the environmental findings of the Corps." Opening Brief For Shee Atika, Inc., Excerpts Attached as Exhibit D. In its brief, Shee Atika repeatedly refers to "dispositive motions" submitted by the parties. This misleading characterization of the facts with likewise presented to the Court in Shee Atika's December 6, 1985 Motion for Summary Reversal, in which Shee Atika alleged to the Court that "the *only* dispute concerning the legal adequacy of the EIS is whether it sufficiently addressed the alternative of an off-island exchange." Attached as Exhibit E.; emphasis in original.

As this Court has noted, "[I]n passing upon requests for additional time to respond to a motion for summary judgment . . . the absolute right of a party to respond,

must be taken into consideration." *Alghanim*, 477 F.2d at 148. Here Sierra Club/Angoon have not been granted a fair opportunity to respond. Because the district court granted plaintiffs' cross-motion for summary judgment, thus invalidating the Corps' EIS, the Rule 56(f) motion was never passed upon. The district court thus never had the opportunity to exercise the discretion appropriately entrusted to it when a party files an affidavit under Rule 56(f) (*Patty Precision*, 742 F.2d at 1264-65), and plaintiffs were deprived of their entitlement of a ruling on their objection before the court disposed of the entire case (*Yashon*, 737 F.2d at 552-53). "Even if the plaintiff were incorrect in arguing that the record was insufficient, he was entitled to be so informed in order that he might respond to the district court's proposal to grant summary judgment with whatever arguments and evidence in the record he could muster." *Id.* at 552; *Costlow*, 552 F.2d at 564. Without the benefit of either additional evidence that could be presented upon further discovery or submission of a formal response based on the evidence the party opposing summary judgment already has, the court is hampered in its ability to determine that summary judgment is truly appropriate. *MGPC*, 763 F.2d at 428; *Sharlitt v. Gorinstein*, 535 F.2d 282, 283-84 (5th Cir. 1976); *Macklin v. Butler*, 553 F.2d 525, 528 (7th Cir. 1977).

CONCLUSION

Almost thirty years ago the Supreme Court cautioned that parties facing a *sua sponte* grant of summary judgment must be given an opportunity to dispute the facts and present their case. *See Fountain v. Filson*, 336 U.S. 681 (1949). In more recent times, the courts of appeal have noted that a party should not be required "to needlessly confuse the issues of a case and additional burdens to the workload of the trial court when the correct disposition of the matter merely requires the court to rule

on the motions pending before it." *Patty Precision*, 742 F.2d at 1265. Here plaintiffs properly tendered their objection to final disposition on their NEPA claims without the benefit of further time for discovery. Their allegations of disputed issues of facts must be treated liberally and all doubts must be resolved in their favor. The court below has neither passed on this objection nor afforded plaintiffs an opportunity to make such arguments as they might. Evidence already in the record demonstrates that material issues of fact are disputed by the parties. Arguments pertaining to other aspects of the parties' compliance with NEPA were not briefed or argued before this Court. For all of the foregoing reasons, the entry of summary judgment for Shee Atika-Sealaska on the validity of the EIS and the § 404 permit for the LTF was in error, and the case should be remanded to the district court for trial on the issues remaining.

Respectfully submitted.

FURTH, FAHRNER, BLUEMLE
& MASON
SIERRA CLUB LEGAL
DEFENSE FUND

By /s/ Jeffrey A. Glick
JEFFREY A. GLICK

DATED: November 19, 1986

By /s/ Durwood J. Zaelke
DURWOOD J. ZAELKE

DATED: November 19, 1986

EXHIBIT A

MINUTES OF THE
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Case No. A83-134 Civ.
The HONORABLE JAMES VON DER HEYDT

SHEE AKITA, INC.

v.

SIERRA CLUB, INC., et al.

Deputy Clerk	*Reporter*
___ Jim Meyers	___ Dolores Runner
X Colleen Cannon	___ Janis Roller
___ Ida Romack	___ _____
___ _____	

APPEARANCES: PLAINTIFF:

DEFENDANT:

PROCEEDINGS: MINUTE ORDER FROM CHAMBERS:

The motion of the City of Angoon, the Angoon Community Association and the Native residents of the City of Angoon to intervene is granted. The clerk shall file the proposed answer lodged with the court. *See* Docket #29.

Sierra Club's motion to join the United States as a party is granted, and accordingly it is ordered that the United States be joined as a party to this action. The

motion to join the Angoon Village Association is denied as moot. *See* Docket #31.

The United States' motion to file an amicus brief, Docket #37, is granted.

Sierra Club's motion for leave to file a supplemental brief, Docket #49 is granted.

Sierra Club's motion to consolidate A83-A234, A84-001, A84-126 and A83-20 is granted. The court finds all the cases involve overlapping issues, but involve different parties. The court finds it will promote fairness and judicial economy to allow all interested parties to brief an issue prior to the court reaching that issue on the merits. Sierra Club and Angoon shall be aligned as party plaintiffs; the United States and its agencies and Shee Atika shall be aligned as party defendants. Plaintiffs shall file an amended complaint consolidating all issues within 30 days of the date of this order defendants shall present all claims in their answer and counterclaim to the consolidated amended complaint. All subsequent filings shall be in the above action, A83-234.

Plaintiff's motion for scheduling of joint oral argument, Docket # 51, is denied as moot.

The court finds all parties who have not filed briefs on the issues except the subsistence issues, raised in Shee Atika's motion for summer judgment should have an opportunity to do so prior to court action on the motion. Accordingly, it is ordered that any additional primary briefs on the issues raised in that motion shall be filed within 30 days of this order; all reply briefs shall be filed within 15 days thereafter.

However, the court finds that all parties have had an adequate opportunity to brief the subsistence issues raised by Shee Atika in A84-126, and argued before this court April 20, 1984. Unless objection is heard within 15 days from the date of this order, the court will consider

the subsistence issues ripe for decision based on the briefs currently submitted in A84-126 and A83-234.

DATED March 4, 1985

cc: Middleton, Gordon, Landon

INITIALS: [Illegible]
Deputy Clerk

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A83-234 Civil
(Consolidated)

SHEE ATIKA, INC.,

Plaintiff,

vs.

SIERRA CLUB, INC.,

Defendant.

[Filed May 21, 1986]

REPLY TO MOTION TO DISMISS
BY SHEE ATIKA AND FEDERAL DEFENDANTS

INTRODUCTION

This responsive brief addresses the motions to dismiss by Shee Atika and Federal Defendants.[1] It addresses the issues order raised by Shee Atika. Separate reply briefs are being filed on § 22(k), and the EIS (the issue that failure to study the land exchange alternative makes the EIS inadequate).

ARGUMENT

1. *Section 22(k) ANCSA*

This issue is addressed in the separate reply brief submitted this same date.

2. *Section 17(b) ANCSA*

Angoon/Sierra Club state a claim under § 17(b) of ANCSA, as applied to Shee Atika's conveyance under § 506(c)(2) of ANILCA. Section 17(b) requires the Secretary of Interior to reserve in any Native conveyance such easements as the Secretary of Agriculture determines are necessary "to insure that the larger public interest is protected." Conf. Com. Rep. No. 746, 92nd Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Admin. News 2247-49; Solicitor's Opinion 82 I.D. (No. 7) 325 (July 8, 1975). This mandatory duty includes but is not limited to, "a full right of public use and access for recreation, [and] hunting. . . ." § 17(b)(1). *See also Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664 (D. Alaska 1972).

The scope of the "larger public interest" protected by the easements was determined by Congress, for Admiralty

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[1] Although Federal Defendants' Motion is entitled Motion for Summary Judgment, most of their arguments focus on whether plaintiffs' complaint states claims for which relief may be granted. The issues whose merits they discuss at greater length have received correspondingly more detailed treatment here and in plaintiffs' other briefs filed this same date.

Island and the Cube Cove lands, in § 101 (general protective policy for wilderness and subsistence), § 503(c) (mandatory duty to protect Admiralty), § 503(d) (mandatory duty to prohibit timber harvesting), § 506(a)(2) (mandatory duty to ensure that nothing

6. *Sections 101 and 102 of NEPA*

The EIS violates NEPA sections 101 and 102 by, *inter alia*, failing to consider the alternative of a land exchange. This issue is addressed in one of Angoon/Sierra Club's separate reply briefs submitted this same date. Plaintiffs allege that the EIS is inadequate for other reasons as well, but until they have the opportunity for further factual development, including discovery, and further legal analysis, plaintiffs are not prepared to present their case on these points.

7. *Due Process Clause*

Defendants assert that Angoon/Sierra Club fail to state a claim that the Secretary's decision to convey Admiralty lands to Shee Atika violated the due process clause of the Constitution. They present three bases for this assertion: 1) the contacts between Shee Atika and the Secretary of Interior were made pursuant to regulation, Fed. Defendants Brief at 6; 2) even if the *ex parte* contacts were improper, Angoon/Sierra Club cannot claim a due process violation because they were not deprived of a protected property interest, Fed. Defendants Brief at 7; and 3) Angoon/Sierra Club's due process claim was mooted by § 315 of Public Law 97-394. Shee Atika Brief at 24. As shown below, each of these arguments is without merit.

Federal defendants suggest that Shee Atika complied with the procedure of 43 C.F.R. § 4.5 when it urged then-Secretary of Interior Watt to personally assume jurisdiction over the Shee Atika conveyance appeal. *See* letters of Shee Atika attorney Richard A. Baenen to Secretary James G. Watt, attached

III. CONCLUSION

For the foregoing reasons, defendants' Motions to Dismiss and for Summary Judgment should be denied.

Respectfully submitted,

FURTH, FAHRNER, BLUEMLE & MASON
BAILY & MASON
SIERRA CLUB LEGAL DEFENSE FUND, INC.

/s/ Durwood J. Zaelke
By: DURWOOD J. ZAELKE
Attorneys for Plaintiffs

DATE: 5/21/85

The undersigned hereby certifies that on the 21st day of May, 1985, the attached documents were mailed to the attorneys of record.

/s/ Debbie Traver

Subscribed and sworn to before me the date last above written.

/s/ Teresa M. Torres
Notary Public
My Commission expires 3/22/89

EXHIBIT C

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Attorneys for City of Angoon
and Sierra Club

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A83-234 Civil
(CONSOLIDATED)

SIERRA CLUB, INC., *et al.*,
Plaintiffs,
v.
SHEE ATIKA, INC., *et al.*,
Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT ON EIS INADEQUACY ISSUE

INTRODUCTION

This memorandum is a reply to federal defendants' and Shee Atika's responses, filed June 10, 1985, to plaintiffs' Cross Motion for Partial Summary Judgment re Inadequacy of EIS for Failing to Study Exchange Alternative, originally filed May 21, 1985, and resubmitted by stipulation on June 18, 1985.[1]

ARGUMENT

1. *Defendants Do Not Dispute That the Law Requires a Broad Definition of the Timber Project, That Alternatives Must Be Addressed to the Larger Project, and That the EIS Contains No Such Alternatives.*

Federal defendants and Shee Atika (collectively "defendants") do not dispute that the authorities cited by plaintiff compel both a broad definition of Shee Atika's project on Admiralty, and a discussion of reasonable alternatives to that broadly defined project. Nor do defendants dispute that the EIS contains no such alternatives to the timber harvest operation as a whole.

As discussed in plaintiffs' memorandum in support of the cross motion filed May 21 ("EIS Memorandum"), Corps regulations require an extremely broad definition of the public purpose of a project. 33 CFR Part 230, App. B, 11b(4). If an alternative in this particular case is "remote and speculative." However, Shee Atika's and the federal defendants' definition of "remote and speculative" would make it unlikely that *any* alternative to the proposed timber operation as a whole would be considered in the EIS. The law requires the Corps to

[1] Plaintiffs oppose federal defendants' attempt to obtain summary judgment on *all* potential claims regarding the adequacy of the Corps' EIS. Plaintiffs cannot at this time present by affidavit facts justifying this opposition, since no discovery on additional inadequacy issues has been conducted. Plaintiffs submit an affidavit pursuant to Federal Rules of Civil Procedure 5B(8), attached hereto, in support of their opposition.

consider alternatives to the broader timber harvesting project, not just to log transport, and to consider alternate locations for the project. Timber harvesting *at another location off-Admiralty* is one of the few alternatives plaintiffs know of that would satisfy the project's broad purposes of increased timber production in Southeast and increased revenues for Shee Atika shareholders. Defendants should not be able to use the "remote and speculative" test to circumvent the explicit requirements of the Corps regulations and NEPA case law regarding the scope and content of the required alternatives. The Corps *must* consider alternatives to the entire project, including alternate locations, and discussing the exchange option is an obvious, straightforward and reasonable way to meet this obligation.

Dated: June 18, 1985

Respectfully submitted,

FURTH, FAHRNER, BLUEMLE & MASON
BAILY & MASON
SIERRA CLUB LEGAL DEFENSE FUND

/s/ Lewis F. Gordon
LEWIS F. GORDON

/s/ Durwood Zaelke
DURWOOD ZAELKE
Attorneys for Plaintiffs

The undersigned hereby certifies that on the 18th day of June, 1985, the attached documents were mailed to the attorneys of record.

/s/ Debbie Traver

Subscribed and sworn to before me the date last above written.

/s/ [Illegible]
Notary Public
My Commission expires 7/25/85

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Attorneys for City of Angoon
and Sierra Club

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A83-234 Civil
(CONSOLIDATED)

SIERRA CLUB, INC., *et al.*,
Plaintiffs,

v.

SHEE ATIKA, INC., *et al.*,
Defendants.

AFFIDAVIT OF LEWIS F. GORDON

I, Lewis F. Gordon, being duly sworn, depose and say as follows:

1. I am legal counsel for the Sierra Club and the City of Angoon in the above-referenced action. I submit this affidavit pursuant to Federal Rules of Civil Procedure 56(f) in support of Plaintiffs' Reply in Support of Cross Motion for Partial Summary Judgment on EIS Inadequacy Issue filed this same date.

2. Plaintiffs cannot at this time, for reasons stated below, present by affidavit facts essential to justify their opposition to defendants' motion for summary judgment on plaintiffs' claims regarding the inadequacy of the Corps' EIS on the log transfer facility.

3. Plaintiffs have not commenced any discovery on the issue of tne inadequacy of the EIS for the following reasons.-

4. First, the Corps did not issue its Record of Decision on the 404 permit until February 25, 1985, and the consolidated complaint, filed pursuant to court order and raising the issue of the inadequacy of the EIS for the first time, was not filed until April 29, 1985. In this short period of time, plaintiffs' counsel has been extremely busy on other aspects of this litigation, preparing various briefs on subsistence and other issues pursuant to the court's briefing schedules. There has been very little time for preparation of discovery requests and for scheduling and taking depositions.

5. Second, plaintiffs believe that success on their cross motion for partial summary judgment on the inadequate alternatives issue would make further discovery on other NEPA issues unnecessary. In the interest of avoiding potentially unnecessary discovery and litigation costs, plaintiffs have put off discovery until after resolution of their Cross Motion for Partial Summary Judgment re Inadequacy of EIS for Failing to Study Exchange Alternative.

6. Plaintiffs' discovery plan regarding the inadequacy of the EIS would in part include the following: (1)

request production of all drafts of the EIS, related documents, and comments submitted; (2) have plaintiffs' experts analyze these materials; (3) take depositions of preparers and commentators, especially representatives of state and local governments; (4) have plaintiffs' experts analyze deposition testimony.

6. Even though formal discovery has not been commenced regarding the inadequacy of the EIS, affidavits previously submitted in this lawsuit by experts and subsistence users regarding the subsistence issues show that there are contested issues of fact with regard to the environmental and subsistence effects of the project. Defendants have admitted that these issues of fact are in dispute. See, e.g., Shee Atika's Supplemental Brief on Subsistence Issues, filed April 18, 1985, at 2, n.2. These affidavits suggest potential triable issues of fact regarding the adequacy of the EIS which will be further explored during the discovery process.

/s/ Lewis F. Gordon
LEWIS F. GORDON

SUBSCRIBED AND SWORN to before me this 18th day of June, 1985.

/s/ Deborah A. Traver
Notary Public in and for Alaska
My commission expires: 8/17/86

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-4413, 86-3582, 86-3617, 86-3618

CITY OF ANGOON, *et al.*,
Plaintiffs-Cross-Appellants,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Defendants,

and

SHEE ATIKA, INC.,
Defendant-Appellant,

and

SEALASKA, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Alaska

OPENING BRIEF FOR SHEE ATIKA, INC.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-4413, 86-3582, 86-3617, 86-3618

CITY OF ANGOON, *et al.*,
Plaintiffs-Cross-Appellants,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Defendants,

and

SHEE ATIKA, INC.,
Defendant-Appellant,

and

SEALASKA, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Alaska

OPENING BRIEF FOR SHEE ATIKA, INC.

ISSUES PRESENTED

In satisfaction of the Federal Government's obligations under the Alaska Native Claims Settlement Act of 1971, Congress directed the conveyance of specific lands

to Shee Atika. Prior judicial rulings (including one from this Court) established that this conveyance was for the economic betterment of Shee Atika and that the lands could be developed, and that this was clearly intended and provided by Congress. Given the foregoing background, the controlling questions presented by this appeal are as follows:

I. Whether the District Court correctly interpreted and applied NEPA in deciding that NEPA required the Corps of Engineers, in the course of its EIS review for a federal permit under Section 404 of the Clean Water Act, to reexamine the policy decision regarding development of the Shee Atika conveyance.

II. Whether NEPA can properly be construed to permit a federal agency or reviewing court to impede or prohibit development on private lands when it has been concluded that the federal action under review will have no adverse environmental effects, and where the sole justification for permit denial is the view of the federal agency or reviewing court that the private lands should not be developed.

III. Whether NEPA authorizes denial of a federal permit in an instance where it is established that (i) the federal action under review will have no significant adverse effects on the environment, (ii) the related private activity (to be conducted on private lands) will likewise have no such effects, and (iii) where the sole basis for denial is the perception of the federal agency (or reviewing court) that another use should be made of the private lands.

STATEMENT OF THE CASE

This is an interlocutory appeal of an injunction entered by the United States District Court for the District of Alaska on November 27, 1985, the injunction becoming effective on December 11, 1985. Excerpts of Record ("ER") 45.

A. *Jurisdiction of the District Court*

Jurisdiction was properly vested in the District Court pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1361.

B. *Jurisdiction of the Court of Appeals*

The jurisdiction of this Court is founded upon 28 U.S.C. § 1292(a)(1) which confers appellate jurisdiction with respect to "interlocutory orders of the District Courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions. . . ."

C. *Appealability of Order*

The Order which is the subject of this appeal is an injunction. Under the provisions of 28 U.S.C. § 1292 (a)(1), an interlocutory appeal lies with respect to an order granting an injunction.

D. *Timeliness of Appeal*

The injunction order was entered on November 27, 1985, with the injunction becoming effective on December 11, 1985. Shee Atika's notice of appeal was filed on December 13, 1985. ER 130. The notice was timely under 28 U.S.C. § 2107.

The Consolidated Complaint herein was filed effective April 29, 1985. ER 1. Subsequently, the parties filed dispositive motions and cross-motions on the claims raised in the Consolidated Complaint. ER 108, 110, 111, 113, 114, 116. The District Court disposed of most of the issues raised in these dispositive pleadings with a series of three orders. The first two orders were issued on October 17, 1985. One of these orders was captioned "Memorandum and Order on Subsistence and Trust Responsibility Issues" (ER 72), and the second was captioned "Memorandum and Order on Section 22(k)" (ER 93). On November 27, 1985, the District Court entered an order captioned "Memorandum and Order on Remain-

ing Issues Raised in Consolidated Complaint." ER 45. The November 27, 1985 Order is the subject of the appeal filed by Shee Atika (No. 85-4413). Subsequently, on December 27, 1985 the District Court issued a Partial Final Judgement, pursuant to Rule 54(b), in conformance of the three Memoranda/Orders earlier entered by the District Court. ER 66. Appeals have been taken from the Partial Final Judgment by the other parties hereto (Nos. 86-3852, 86-3617, 86-3618). All of the appeals were consolidated by order dated March 31, 1986.

On December 5, 1985, Shee Atika filed a motion in the District Court seeking reconsideration of the November 27 injunction order. ER 118. That motion was summarily denied by the District Court on December 6. Clerk's Record ("CR") 173. Notice of appeal from the November 27 injunction was filed by Shee Atika on December 13. ER 130. On December 17, 1985, Shee Atika filed a Motion for Summary Reversal of District Court Order and Injunction with this Court. (U.S.C.A. No. 85-4413). That motion was denied by the Court by order dated April 2, 1986.

> forcing Shee Atika to accept exchange proposals it would otherwise refuse cannot be deemed a proper alternative. An exchange, if implemented, could result in withdrawal of the requested modification to the permit by the permittee and no permit would be issued (Corps Alternative 1). Upland activities which could occur without a Corps permit would be unlikely to continue. [ER 152-53.]

After completing its careful environmental review, the Corps concluded that the construction/operation of Shee Atika's log transfer facility would have no significant adverse effects on the environment. Subsequently, the Corps of Engineers rendered its decision to issue a Section 404 permit to Shee Atika for construction of its log transfer facility. ER 325. The Corps found that the proposed work was in the public interest and in accord

with all applicable laws and regulations. The Record of Decision prepared by the Corps also incorporated a number of required environmental protection conditions, to further minimize impacts on the environment. *Ibid.*

Following issuance of the Record of Decision and issuance of a Section 404 permit to Shee Atika, Sierra Club-Angoon filed a dispositive motion seeking invalidation of the permit for alleged violation of NEPA requirements. The only contention advanced by Sierra Club-Angoon was that the Corps had violated NEPA by not conducting an in-depth study of the land exchange "alternative." Sierra Club-Angoon did not challenge in any manner the environmental findings of the Corps.

After the District Court consolidated all of the litigation relating to the Shee Atika conveyance, the parties filed a flurry of dispositive motions seeking summary judgment on most of the claims raised by Sierra Club-Angoon. On October 17, 1985, the District Court entered two Memoranda/Orders, ruling on many of the claims. In one of these Memoranda/Orders, the District Court dismissed Sierra Club-Angoon's claim that Shee Atika was statutorily barred from developing its Admiralty Island lands. ER 72. In dismissing this claim and rejecting the Sierra Club-Angoon contention that Congress had made the conveyance to Shee Atika for exchange purposes only, the District Court made the following findings:

> Congress never intended to force Shee Atika into an exchange that was not voluntary on both sides. [ER 78.]
>
> It is not credible to believe that Congress could intend to deprive Shee Atika of any economic use of its lands, thereby depriving Shee Atika of much of its bargaining power and forcing an exchange, without making some mention of that intent in the legislative history. [ER 81.]

> Congress . . . intended that any such exchange be voluntary on both sides. Therefore, Section 506(c) grants Shee Atika full economic and beneficial use of its lands, subject of course to the valid existing rights and easements referred to in that section. [ER 83-84.]
>
> [T]he court finds that Congress did not intend to compel any exchange. [ER 84.]
>
> The court declares that the lands conveyed to Shee Atika on .December 9, 1981, pursuant to Section 506(c) of ANILCA, are "Settlement Act Lands" that may be developed commercially by [Shee Atika] . . . ER 92.

One month later, the District Court issued a third Memorandum/Order in which it disposed of the remaining issues raised by the parties. ER 45. One of the claims ruled on in that Memorandum/Order was Sierra Club-Angoon's claim that the EIS was defective for failure to consider the land exchange alternative. In a surprising turnabout, the District Court ruled in Sierra Club-Angoon's favor, holding that NEPA required the Corps of Engineers to evaluate the merits of the exchange alternative.[12] The District Court thereupon invalidated the Section 404 permit issued to Shee Atika and enjoined Shee Atika "from all use of the Cube Cove Log Transfer Facility until a valid § 404 permit has been obtained." ER 65. The rationale for the District Court's holding was expressed as follows:

> Because it would be proper for the Corps to deny a permit on the basis that a fair off-island exchange would better serve the public interest, it would be proper for the Corps to evaluate an off-island exchange as an alternative in the EIS. [ER 62.]

On December 5, 1985, Shee Atika filed a motion for reconsideration, with supporting memorandum, with the

---

[12] In each of the several other rulings made by the District Court on the claims raised by Sierra Club-Angoon, it ruled in favor of Shee Atika and the other defendants.

District Court. ER 118. In that filing, Shee Atika demonstrated that some basic assumptions made by the District Court were factually erroneous. Specifically, Shee Atika addressed the District Court's related assumptions (i) that a land exchange was feasible (ER 59-61) and (ii) that any funding appropriations needed for an exchange would involve only "minor legislative adjustment or approval" (ER 59). Specifically, Shee Atika cited to a recent consultant's study, financed in part by Sierra Club, which had made a definitive review of possible land exchanges.[13] Shee would have been compelled to rule that the objections to the EIS were without merit. The District Court's ruling on the EIS adequacy issue are completely at odds with the substantive provisions and goals of the federal statutes mandating the Shee Atika conveyance. For that reason alone, the District Court's ruling on this issue cannot be allowed to stand.

CONCLUSION

For the foregoing reasons, Shee Atika submits that this Court should reverse the District Court's ruling of inadequacy of the EIS, vacate its related order invalidating the Section 404 permit, and vacate the injunction issued by the District Court.

Respectfully submitted,

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[13] This study was completed after the EIS process.

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EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. ———

SHEE ATIKA, INC.,
Appellant,

v.

CITY OF ANGOON, *et al.*,
Appellees.

MOTION FOR SUMMARY REVERSAL OF
DISTRICT COURT ORDER AND INJUNCTION

Shee Atika, Inc., hereby moves the Court for summary reversal of that part of the District Court's memorandum and order of November 26, 1985, which held the permit issued by the Corps of Engineers to Shee Atika, Inc., to construct a log transfer facility in the navigable waters of the United States void on the ground that the environmental impact statement prepared by the Corps was inadequate and providing

> (6) THAT as of December 11, 1985, Shee Atika shall be enjoined from all use of the Cube Cove Log Transfer Facility until a valid § 404 permit has been obtained.

Notice of Appeal was filed on December 13, 1985.

This case was before the Court in *City of Angoon v. Marsh*, 749 F.2d 1413 (Opinion of December 27, 1984), wherein this Court reversed the District Court and vacated an injunction prohibiting Shee Atika from developing its lands. The Court was composed of Judges

Sneed, Wright and Alarcon. Shee Atika requests that its motion be referred to that panel of judges because of their familiarity with the case.

A memorandum in support of this motion is attached.

Respectfully submitted,

By /s/ Richard Anthony Baenen
RICHARD ANTHONY BAENEN

By /s/ Pierre J. LaForce
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Attorneys for Appellant

December 16, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. ———

SHEE ATIKA, INC.,
Appellant,

v.

CITY OF ANGOON, *et al.*,
Appellees.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY REVERSAL

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MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY REVERSAL

REASONS SUPPORTING SUMMARY REVERSAL

1. The District Court's ruling ignores, and is contrary to the holding by this Court, vacating an earlier injunction issued by the District Court, that Congress, by section 506(c) of ANILCA, granted Shee Atika Settlement Act lands on Admiralty Island for economic development. *City of Angoon v. Marsh*, 749 F.2d 1413 (1984).

2. The District Court's ruling is manifestly erroneous, and reversal is plainly warranted.

3. The effect of the holding and injunction is so devastating to Shee Atika's precarious financial condition that unless this Court summarily reverses, Shee Atika may not survive as a viable entity.

STATEMENT OF THE CASE

This is an interlocutory appeal of an injunction entered by the United States District Court for the District of Alaska, effective December 11, 1985. (A copy of the Memorandum/Order entering same is attached as Appendix A.) Notice of Appeal was timely filed on Deecmber 13, 1985.

In their Consolidated Complaint herein, Sierra Club/Angoon alleged, *inter alia*, that the Environmental Impact Statement ("EIS") prepared by the Corps of Engineers with respect to issuance of a section 404 Clean Water Act permit to Shee Atika to construct a log transfer facility ("LTF") on Shee Atika's Admiralty Island lands was defective for failure to study as an alternative the possible exchange by Shee Atika of its lands on Admiralty for off-Island lands.[1]

---

[1] Sierra Club/Angoon did not challenge the EIS on any substantive grounds, only the alleged failure to study as an alternative the exchange of Shee Atika's lands.

Motions and cross-motions for summary judgment were filed by the parties on all the issues raised in the Complaint. On October 17, 1985, the District Court filed two memoranda and orders, one on the subsistence and trust responsibility issues, the other on the section 22(k) issue (Appendices B and C). On November 27, 1985, the District Court filed its memorandum and order on the remaining issues in the complaint, holding against Sierra Club/Angoon on all issues except that challenging the adequacy of the EIS and ordered

> (7) THAT as of December 11, 1985, Shee Atika shall be enjoined from all use of the Cube Cove Log Transfer facility until a valid § 404 permit has been obtained. [Appendix A, p. 21.]

On the afternoon of December 5, 1985, Shee Atika filed with the District Court a motion for reconsideration, which the District Court denied the next morning.

OVERVIEW

This is the second time within 17 months the District Court has enjoined Shee Atika from productively developing its Settlement Act lands and the District Court's latest injunction issued less than one year from the date ths Court vacated the * * *

* * * *

STATEMENT OF THE FACTS

A. *Preparation of the EIS*

Pursuant to stipulation entered into by the federal defendants and Sierra Club/Angoon, it was determined in March 1983 to prepare an EIS for Shee Atika's proposed LTF.[2] All told, the EIS process consumed some 19 months.[3] The final EIS documents, consisting of a basic

[2] Shee Atika was not a party to this determination.

[3] In fact, the decision of the Corps to permit Shee Atika to continue with the construction of its LTF did not come until almost two years after the decision to conduct an EIS was made.

statement of some 150 single-spaced pages and appendices of three times that size, reflect that level of effort. This is the *only* EIS ever undertaken with respect to construction/operation of an LTF. The Corps' environmental review was comprehensive[4] and addressed every conceivable facet of the LTF. The *only* dispute concerning the legal adequacy of the EIS is whether it sufficiently addressed the alternative of an off-Island exchange between Shee Atika and the Federal Government.

The Corps *did consider* the exchange alternative, but concluded, in accordance with the applicable regulation,[5] that in-depth evaluation was not required. The Corps' consideration of the exchange alternative was described in the EIS as follows:

A number of commenters have suggested that an exchange of Shee Atika lands on * * *

* * * *

Dispositive motions were filed in the District Court after remand, and all issues were fully submitted by late June 1985. On October 17, 1985, the District Court filed two memoranda and orders, denying all of Sierra Club/Angoon's issues addressed therein (Appendices B and C), and on November 27, 1985, it filed the memorandum and order that enjoins Shee Atika (Appendix A). In that memorandum and order the District Court rejected all of Sierra Club/Angoon's claims but one—that the EIS was inadequate because the Corps failed to consider as an alternative to permitting the long transfer facility the possible exchange by Shee Atika of its Admiralty Island lands—and again enjoined Shee Atika.

Shee Atika does not share in the economic benefit of the Settlement Act. It was, in effect, incorporated on credit in 1974 and, with minor exception, has existed on

---

[4] The Corps commented: "Biological studies in Cube Cove have been more complete than in any other LTF in Southeast Alaska." EIS Appendices at N-148.

[5] 33 C.F.R. Part 230, App. B, ¶ 11.b.(5)(b) (1985).

credit. Its efforts to harvest timber in 1984 and 1985 were thwarted by the District Court's first injunction and the pendency of the litigation, and its renewed efforts thwarted by the most recent injunction. Shee Atika must generate income now from the development of its lands if it is to survive. In October 1985, it offered a stumpage sale, with the bids to be opened on February 28, 1986. The terms of the sale required the successful bidder to pay 50% of the sales price at closing. It was anticipated the sale would generate a minimum of $1.5 million when the contract was awarded. The sale must now be cancelled, because no * * *

* * * *

CONCLUSION

For the foregoing reasons, Shee Atika submits that the Court should summarily reverse the District Court's ruling of inadequacy of the EIS, and vacate the injunction issued by the District Court forthwith.

By /s/ Richard Anthony Baenen
RICHARD ANTHONY BAENEN

By /s/ Pierre J. LaForce
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Attorneys for Shee Atika, Inc.

PROOF OF SERVICE

I, MATTHEW A. SURPRISE, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am employed by Furth, Fahrner, Bluemle & Mason, at the address indicated, whose members are members of the State Bar of California and at least one of whose members is a member of the Bar of each Federal District Court within California; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I served a true and correct copy of the following document(s) in the manner indicated below:

SIERRA CLUB/ANGOON'S PETITION FOR REHEARING

(XX) by today depositing, at San Francisco, California, the said document(s) in the United States mail in a sealed envelope, with first-class postage thereon fully prepaid, addressed to: (and/or)

( ) by today personally delivering the said document(s) to the person(s) indicated below in a manner provided by law, by leaving the said document(s) at the office(s) or usual place(s) of business, during usual business hours, of the said person(s) with a cleark or other person who was apparently in charge thereof and at least 18 years of age, whom I informed of the contents.

[SEE ATTACHMENT A]

Dated: November 19, 1986

/s/ Mathew A. Sawyer

ATTACHMENT A

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